

1 REPORTER'S RECORD

2 **VOLUME 2 OF 35 VOLUMES**

3 TRIAL COURT CAUSE NO. 1384794

4 COURT OF CRIMINAL APPEALS NO. AP-77,025

5 OBEL CRUZ-GARCIA) IN THE DISTRICT COURT OF
6)
7 Appellant)
8 V.) HARRIS COUNTY, TEXAS
9)
10 THE STATE OF TEXAS)
11 Appellee) 337TH JUDICIAL DISTRICT

12
13 _____
14 **PRETRIAL MOTIONS**
15 _____
16

17 On the 18th of January, 2011, the following
18 proceedings came on to be held in the above-titled and
19 numbered cause before the Honorable Mike Anderson, Judge
20 Presiding, held in Houston, Harris County, Texas.

21 Proceedings reported by computerized stenotype
22 machine.
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1 (In open court, defendant present.)

2 THE COURT: Cause Nos. 1181910 and 1289188
3 and 1289189, The State of Texas vs. Obel Cruz-Garcia.
4 Cause No. 1181910, charged with capital murder; Cause
5 No. 1289188, charged with capital murder; 1289189,
6 charged with aggravated sexual assault. All are alleged
7 to have occurred on or about September 30, 1992, in
8 Harris County, Texas.

9 We are here this morning, this is a trial
10 setting. There was a Motion for Continuation filed,
11 according to the file stamp, January 11, 2011. We will
12 consider that this morning. I have read the Motion for
13 Continuance in its entirety. I have also read the
14 amendment previously filed Motion for Continuance; and
15 although on that document it only alludes to 1289188,
16 these motions will apply to all three of the
17 aforementioned cause numbers. And that's by agreement of
18 all parties, I believe.

19 MS. TISE: Yes, Judge.

20 MR. CAPITAINE: It is, Judge.

21 THE COURT: I have read the contents of
22 the motions or the Motion for Continuance and the
23 amendment. I am under the impression that there is DNA
24 evidence that for whatever reason -- and again, not to
25 point doubt at either side or cast aspersions either

1 way -- that needs to be examined by a defense expert.
2 That has not been done. It appears to me that that needs
3 to be done before a fair trial can be had. That is my
4 ruling on that part of the Motion for Continuance.

5 But there are some other allegations made,
6 some which have greater weight than others. But the one,
7 in my opinion, that has the greatest weight may not be a
8 legal reason -- it probably should be, if it's not -- but
9 it's come to my attention that the attorney of record in
10 this case, Mr. Capitaine, is having some personal issues
11 that are no fault of his own, issues that hopefully any
12 person would understand and sympathize with. I can't
13 imagine how anyone could be expected to have their mind
14 on a trial -- even a trial of this magnitude and this
15 importance -- when a loved one, especially someone as
16 close as his mom is terminally ill and is under his care.
17 She has, from my understanding of the affidavit, has
18 chosen to be with him and his family -- his children
19 rather than in Hospice care and that, basically, he is
20 providing what is essentially Hospice care for his
21 mother. That's enough for me. I think, hopefully, the
22 Courts understand that while what we do down here is
23 important, our personal lives, in this humble Court's
24 opinion, are more important.

25 So, your Motion for Continuance is

1 granted.

2 We will look at dates that will give --
3 and, again, for the record, so that the record has some
4 indication, we had a conference off the record with both
5 counsel for the Defense and the State; and the request
6 that the Defense has made, I think, is sometime in early
7 May. Anyway, at some point in the late spring or early
8 summer, it's believed that all of the DNA evidence and
9 expert examination, report preparation, and trial
10 preparation will be completed. Is that fairly accurate?

11 MR. SHELLIST: Yes, Your Honor. Well, I
12 mean -- again, I'm presuming --

13 THE COURT: Well, as far as you can see.
14 I mean, obviously, you don't have a crystal ball and you
15 can't tell; but that's just a good general rule of time
16 that we can work in?

17 MR. SHELLIST: Yes, Your Honor.

18 THE COURT: Any objection by the State?

19 MS. TISE: No objection, Judge.

20 THE COURT: It's just the right thing to
21 do.

22 Is there anything that we need to take up
23 now? There are certainly motions in limine. Those
24 certainly can be taken up at the time of trial or as
25 trial is approaching. The Motion for Discovery is on

1 file. There apparently is some evidence that needs to be
2 examined by the Defense; and, again, for whatever
3 reason -- not that they need to be gone into at this
4 time -- but needs to be examined. And that will be
5 opened to the Defense, I understand; is that correct?

6 MS. TISE: Yes, Judge.

7 THE COURT: So, we can start the ball
8 rolling as far as that goes.

9 Is there anything else that we need to
10 deal with?

11 MR. SHELLIST: There is, Judge. And,
12 again, just so the record is clear -- and I've already
13 spoken to Ms. Tise, and she's going to get these
14 documents for us -- but the Motion for Discovery asking
15 for -- we filed that additional one regarding DNA
16 evidence. I know that file has gotten thick; but if
17 that's in there, is that motion then granted with respect
18 to the items on there so that we can make sure that we
19 have the items that are requested in that Motion for
20 Discovery?

21 THE COURT: Well, I'm flattered by your
22 belief in my memory, but let me make sure. There are
23 several motions for discovery. Can you point me to
24 which -- here's Motion for Discovery and Production --

25 MR. SHELLIST: No, Judge. There's one

1 that should say Regarding DNA Evidence. Motion for
2 Discovery Regarding DNA Evidence.

3 I'm happy to look through it, if it will
4 be easier.

5 THE COURT: I will bow to y'all's
6 familiarity with this file.

7 MR. SHELLIST: Filed on January 11th.

8 Judge, I can make a copy and refile.

9 And just, while we're on the record, I
10 should let you know that HPD has already started to
11 comply with that because I issued a separate subpoena on
12 it because time was of the essence.

13 THE COURT: Well, I think we should treat
14 time as still of the essence just so that anybody that's
15 been subpoenaed doesn't get the idea that they can put
16 something else on the front burner. It would certainly,
17 I think, benefit everybody. The earlier you get this,
18 the more access you'll have to it. So, as far as that
19 goes, I'll be available if y'all need some backup to the
20 different agencies to get what you need, let me know.
21 I'll be happy to help in any way I can.

22 MS. TISE: And if I can just say, Judge,
23 at this point in time, I think the subpoena is the more
24 appropriate way to handle it. Because of the fact that
25 these are, like, slides in gel, I don't have those and

1 really don't want them. So, I can't -- I don't want to
2 be responsible for getting them to turn over to Defense
3 attorney. But if they're in the possession of the DNA
4 lab, I think it would be more appropriate for them to get
5 them directly from them via subpoena, which my
6 understanding is they're working on doing that now.

7 MR. SHELLIST: They do. I just -- and,
8 Judge, however you want to handle it. I just -- I may
9 have to file -- if I don't get it timely, I may have to
10 file some kind of Motion to Compel or something.

11 THE COURT: Sure.

12 MR. SHELLIST: I did file one already with
13 Orchid; and in fairness to them, it was just done on the
14 11th. But I went over the subpoena with them, but I
15 faxed it to them right away. Maybe they're working on
16 it; but as you can see, we don't always get things.

17 THE COURT: Sure. That's why I'm offering
18 my help. Sometimes, for some reason, they think if a
19 judge has gotten a deputy to call -- and I've had good
20 luck with that because they listen to the deputies over
21 there and we can get what you need. I mean, that's what
22 this is all about. We just need to make sure you get
23 what you're entitled to. And I don't know that it's fair
24 to make the State get it for you, but I'll work with you
25 on it. I'll make sure you get it, if it can be gotten.

1 And it needs to be gotten, I think, directly through them
2 and cut out the middleman.

3 MS. TISE: And, Judge, I will say with
4 regard to Orchid, specifically, they've been in
5 communication with me, notified me that they received the
6 subpoena. I advised them, you know, that I certainly had
7 no objection to their compliance with that; and that they
8 were in the process of working on that. I don't know
9 where they are on it, but...

10 THE COURT: Well, let's stay on it, to use
11 a legal term; and Ms. Armand can always get in touch with
12 me. I'm happy to help you get it because you're entitled
13 to it; and the faster you get it, the better. The more
14 time your expert has to look at it and to form whatever
15 expert opinion they need. And then if some follow-up
16 needs to be done, we can have that all done so that
17 you've got everything you need by the time we set it.
18 We'll set it with a cushion, figuring something probably
19 won't go smoothly, just because that's the way things
20 are, but far enough ahead so that at that point we can
21 say, okay, we're going to try it this date. That's
22 plenty of time, and then we're in good shape.

23 MR. SHELLIST: Just so I'm clear, I'll
24 keep the subpoenas in motion. I'll issue another one for
25 Genetic Design, if I can find them. If I can't, maybe

1 Natalie can help me with that.

2 MS. TISE: I've got an address for them.

3 MR. SHELLIST: Okay. And then if, within
4 a reasonable period of time, within the next say 30 days
5 or so --

6 THE COURT: Sure.

7 MR. SHELLIST: -- I don't get anything
8 back, I can come back to the Court for some sort of
9 compelling -- a Motion to Compel Compliance with the
10 Subpoena or something to that effect, and Your Honor will
11 help?

12 THE COURT: Absolutely. You are exactly
13 right. And I think if we all push to get that done, it
14 will get done. And 30 days is a good time to look at it;
15 and if it's not -- or if you start getting the feeling
16 that somebody is dragging their feet or they're not going
17 to comply, let me know and I'll get involved and we'll
18 get it for you.

19 MR. SHELLIST: Well, that takes care of
20 DNA discovery.

21 Another issue that might be helpful for
22 the Court to weigh in on is we filed -- either to compel
23 discovery or for an in-camera inspection. There is,
24 Judge, in this case -- and I'm sure you could tell from
25 reading this -- there is a file on Deetrice Wallace, who

1 was the first criminalist in 1992 to touch this case for
2 the office. She handled the evidence that's in the
3 report. I went up and did a PIA request. The State did
4 provide us with Brady notice of her conviction. She was
5 convicted with three counts of tampering with a
6 governmental record. So, we did a PIA request. I went
7 up and viewed the file; and Scott Durfee, with the State,
8 provided me with some of the information but,
9 specifically, he held back a bunch of work product. And
10 one of them was a disciplinary file on her. And I don't
11 expect the State -- I mean, I don't know if they will
12 willingly turn that over to me. I'd love to see it. But
13 I think --

14 THE COURT: I don't know if they can.

15 MR. SHELLIST: They may not. But I think
16 it would certainly be worthwhile and now that we have
17 time, I would ask the Court to do an in-camera inspection
18 of at least that to see if there's anything in there that
19 falls under Brady.

20 THE COURT: Sure.

21 MS. TISE: I've got them in my possession;
22 and, actually, that was my case. I asked my assistant to
23 look through all of those files. I asked her to look for
24 Brady material in the files other than, obviously, the
25 conviction and the 2007 stuff she was involved in. So,

1 you did receive already copies of a significant portion
2 of some of her files. You just didn't receive the --

3 THE COURT: You just want me to look at
4 the disciplinary records?

5 MR. SHELLIST: I want you to look at the
6 disciplinary records to look for hints of dishonesty --

7 THE COURT: Brady material.

8 MR. SHELLIST: -- and truthfulness and
9 things like that or whatever else the Court deems would
10 be Brady.

11 THE COURT: Okay.

12 MS. TISE: And I can speak for Maite, we
13 didn't find anything like that in the file; but we'll
14 certainly turn it over to the Court for your inspection.

15 THE COURT: Okay.

16 MR. SHELLIST: I would think the only
17 other thing, Judge, is -- and I don't know if you want to
18 take it up now or not, although this may be a good time.
19 We also filed a Motion to Dismiss the sexual assault
20 count because we believe it's barred by statute of
21 limitations. That's been on file; the State has a copy
22 of it. It's an extra count that's hanging around. If
23 the Court wants to rule on that now or read the motion or
24 let the State respond to that motion.

25 THE COURT: Do y'all intend to try that?

1 MS. TISE: It wasn't our intention to try
2 that today. When we try this case in the future, my
3 intention is to go forward on the capital murder.

4 THE COURT: If it becomes a bridge we need
5 to cross, we will do that in plenty of time to give you a
6 chance to make a record or put on testimony or whatever
7 you need to do, but flesh it out as it needs to be
8 fleshed out.

9 MR. SHELLIST: Okay, Judge. Let me just
10 look -- and thank you for your patient.

11 THE COURT: Did y'all not find this Motion
12 to Produce Record Regarding DNA Analysis in the court's
13 file?

14 Go ahead -- let's stay with this stream of
15 thought. Before we get away, I want to address that and
16 make sure there is one in there, even if we have to
17 substitute a copy.

18 MR. SHELLIST: I'll look through it again,
19 but I don't have anything else that can't wait until we
20 get closer.

21 THE COURT: Okay.

22 MR. SHELLIST: Can I ask the Court, just
23 since this is a unique situation where we have a visiting
24 judge that, you know, doesn't have a regular place, I
25 guess -- and we've never dealt with this before. If we

1 have motions or anything that we need to take before the
2 Court, should we just approach Ms. Armand and ask --

3 THE COURT: Ms. Armand?

4 MS. ARMAND: I suggest that we set a
5 pretrial motion setting, say, two weeks, three weeks
6 before the trial date. That way, everybody comes back,
7 make sure we're on the same page.

8 THE COURT: Yeah. Well, let's do it
9 around 30 days from now. We'll kind of do a status
10 hearing.

11 MR. SHELLIST: Perfect.

12 THE COURT: Let me just see something here
13 real quick.

14 MR. SHELLIST: Judge, it doesn't appear to
15 be in here, but I can make copies of it.

16 THE COURT: Well, I mean, I think your
17 copy is file stamped and it would show -- any objection
18 to --

19 MS. TISE: Well, my only objection would
20 be if that's a discovery motion, that puts the obligation
21 on me to produce it.

22 THE COURT: Well, I didn't rule on it. My
23 ruling was that we'll do it another way. I'm not going
24 to make you the middle person. I'm just saying if it was
25 something that was in the file, it just needs to be

1 there. I'm not going to make you have to do it.

2 MS. TISE: I don't have any objection to
3 it, Judge.

4 MR. SHELLIST: Okay. When we get that,
5 that one is denied, but we will use subpoena to
6 accomplish what we need to accomplish, with the Court's
7 assistance.

8 THE COURT: Right. It's denied as far as
9 making the State produce it.

10 MR. SHELLIST: Understood.

11 Judge, there's one other motion. I found
12 the one where it was Defense Request to Transfer Motions
13 to the New Cause Number. I know you did it verbally, but
14 it's unsigned. I know the State filed one as well, and I
15 believe that was signed.

16 THE COURT: When did you file this?

17 MS. TISE: I think those were all filed on
18 Monday.

19 THE COURT: See, this is the first I've
20 seen it -- the first I've seen these motions.

21 MS. TISE: Monday, the 10th. That was
22 when I was in Puerto Rico.

23 MR. SHELLIST: I guess we should have gone
24 to -- we were going to the 337th and talking to their
25 coordinator and saying, Can you help us get these

1 motions? He said, I'll take care of it; or, I'll call
2 the Judge. And I know you were in trial, Judge; and we
3 probably -- it just didn't work.

4 THE COURT: Well, I said I would come down
5 Thursday and hear them.

6 MR. SHELLIST: We didn't -- we didn't hear
7 about that, so...

8 We'll go through Ms. Armand from now on.

9 THE COURT: Anyway, bottom line is, you
10 know, this is kind of new territory, I guess. So, nobody
11 is to blame for anything. We'll just go from here.

12 All right. Let's see, 30 days from now
13 would be in February. From the 15th through the end of
14 February, I'm open.

15 MR. CAPITAINE: Judge, would the 18th
16 work, which is exactly a month from today?

17 MS. TISE: That's fine with me.

18 MR. CAPITAINE: It's a Friday.

19 THE COURT: Let's do it on Thursday. How
20 about the 17th? Does that work?

21 MS. TISE: That works.

22 THE COURT: Y'all may get called away to
23 pick a jury on a Friday. I know some people do that.
24 But not many people pick a jury on a Thursday.

25 MR. SHELLIST: Not to get cute, Judge, but

1 where would this be held?

2 MS. ARMAND: I'll go ahead and schedule it
3 for the same courtroom.

4 THE COURT: That's not cute at all.

5 Stephanie is an amazing --

6 MS. TISE: Coordinator.

7 THE COURT: Well, she's more than that.

8 MS. TISE: Coordinator extraordinaire.

9 THE COURT: And juggler.

10 Okay. Let's see, so, 9:00 o'clock here on
11 February 17th?

12 MR. CAPITAINE: Yes, Your Honor.

13 THE COURT: Now, the trial setting, y'all
14 talked about sometime in May?

15 MS. TISE: I am scheduled to begin voir
16 dire on a death capital on April 29th in Judge Hill's
17 court. The trial date is May 31; voir dire is April
18 29th.

19 THE COURT: That takes May out of the
20 picture for sure. But, then again, it gives more time
21 for stuff to be ready.

22 Last week of June, I'm in Mark Ellis's
23 court, through July 7th. How about a time in June?

24 MS. TISE: Works for me.

25 MR. CAPITAINE: Fine with me.

1 THE COURT: I know there's something that
2 just got scheduled. I need to find out exactly when that
3 is; but if June is a good target date, we'll figure that
4 out. I'll know today, and we'll let you know and go from
5 there. So, we'll have a status hearing, kind of a
6 pretrial motion status hearing in about 30 days; and then
7 we'll go from there.

8 MS. TISE: Okay.

11 MR. SHELLIST: No, sir. Thank you, Judge.

12 MS. TISE: I think this case will take a
13 full five days, don't you?

14 THE COURT: Well, I want to have that week
15 and maybe just as a buffer a couple of days the following
16 week, just in case. I just sat on a case in the 185th
17 and everybody thought it was going to be done in four
18 days and I'm not sure it's over yet. Nobody was dragging
19 their feet; it just took time to do it.

20 So, June, we will call y'all today and
21 maybe get everybody on a conference call. I will stalk
22 Stephanie -- follow her around and drive her nuts until I
23 give her the dates, and then we'll get with y'all and
24 make sure it's okay. Fair enough?

25 MS. TISE: Thanks, Judge.

1 MR. SHELLIST: Thank you, Judge. May we
2 be excused?

3 THE COURT: You bet.

4 (Proceedings concluded.)

1 STATE OF TEXAS
2 COUNTY OF HARRIS
3 I, Jill Hamby, Official Court Reporter in and for
4 the 337th District Court of Harris County, State of
5 Texas, do hereby certify that the above and foregoing
6 contains a true and correct transcription of all portions
7 of evidence and other proceedings requested in writing by
8 counsel for the parties to be included in this volume of
9 the Reporter's Record in the above-styled and numbered
10 cause, all of which occurred in open court or in chambers
and were reported by me.

11 I further certify that this Reporter's Record of the
12 proceedings truly and correctly reflects the exhibits, if
13 any, admitted, tendered in an offer of proof or offered
14 into evidence.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record will be paid by
17 Harris County.

18 Reporter's Record supplied to Harris County District
19 Clerk's Office; not to be copied or duplicated in any way.

20 WITNESS MY OFFICIAL HAND, the 9th day of October, 2013.
21

22 /s/Jill Hamby
23 Jill Hamby, CSR
24 Texas CSR 5814, Expires 12/31/15
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